SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 638

LEO CRUMLEY,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari To the Supreme Court of Tennessee.

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BRIEF

In Opposition to Petition for a Writ of Certiorari To the Supreme Court of Tennessee.

OPINION BELOW.

The unreported opinion of the Court of Criminal Appeals of Tennessee was entered and filed on April 8, 1969 and since a correct copy of said opinion is not attached to the petition in this case, a certified copy of the same is attached hereto as Appendix A. A correct copy of the order of the Tennessee Supreme Court denying Petitioner a writ of certiorari, also unreported, entered on June 16, 1969, is also attached to the petition in this case.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition. However, the Respondent directs attention to the fact that the petition seeks a writ of certiorari directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals of Tennessee. Therefore, the Respondent respectfully submits that the petition seeks a writ of certiorari directed to the improper court.

QUESTION PRESENTED.

The Respondent is dissatisfied with the presentation of the question involved by the Petitioner, and, therefore, pursuant to **Rule 40 (3)** of the **Supreme Court Rules**, presents the question as follows:

(1) Whether or not the Petitioner was denied a fair trial by the action of the trial judge in allowing the State's witness, Officer David Lee Beene, to be present in the courtroom during the testimony of another State's witness, Officer William S. Bynum, in violation of the rule of exclusion of witnesses, where Officer Beene was the prosecutor in one (1) of the two (2) cases against the Petitioner being tried together at the Petitioner's request.

STATEMENT OF THE CASE.

The Petitioner Leo Crumley, was jointly indicted with one Robert Cross on June 5, 1967, by the Grand Jury of Marion County, Tennessee, upon three (3) charges, namely (1) burglary in the third degree, (2) attempt to commit burglary, and (3) possession of burglarious instruments or tools. All three (3) cases came on for trial only against the Petitioner on July 5, 1967, before the Honorable Albert F. Sloan, Judge, and a jury, in the Circuit Court of Marion County, Tennessee, at Jasper, Tennessee, upon the Petitioner's not guilty pleas. Upon defense counsel's insistence that all three (3) cases be tried together on this date, the State's attorney, concluding that there was a lack of sufficient jurors available to try all three (3) cases, voluntarily dismissed the case of attempted burglary. Thereafter, upon the conclusion of all the proof, the argument of counsel, and the charge by the judge, the jury found the Petitioner guilty of both the remaining charges and sentenced him to confinement in the Tennessee State Penitentiary for a period of three (3) years upon the burglary conviction and three (3) years confinement upon the conviction of possession of burglarious instruments or tools. Judgment was entered in accordance with the jury's verdict and upon the overruling of the Petitioner's motion for a new trial on October 4, 1967, the Petitioner prayed for, was granted and duly perfected an appeal-in-error to the Court of Criminal Appeals of Tennessee assigning only the same alleged error as is presented herein. The Court of Criminal Appeals of Tennessee in an unreported opinion filed on December 30, 1968, reversed these convictions because of a conflict between the minute entries and the bill of exceptions in the record. Upon considering and granting a petition to rehear filed by the Respondent, the Court of Criminal Appeals of Tennessee in an unre-

ported opinion filed on April 8, 1969, reversed its earlier opinion, corrected the aforesaid opinion, and affirmed both the Petitioner's convictions. On June 16, 1969, the Tennessee Supreme Court denied the Petitioner's petition for a writ of certiorari.

ARGUMENT.

I.

The only question raised by the Petitioner is whether or not he was denied a fair trial by the action of the trial court in allowing the State's witness, Officer David Lee Beene, to be present in the courtroom during the testimony of another State's witness, Officer William S. Bynum, in violation of the rule of exclusion of witnesses, where Officer Beene was the prosecutor in one (1) of the two (2) cases against the Petitioner being tried together at his request.

As hereinbefore stated, there were two (2) cases against the Petitioner which were consolidated or being tried together on July 5, 1967, at the request of the Petitioner. The named prosecutor in the possession of burglarious instruments indictment was Mr. David Lee Beene, a special police officer for the City of South Pittsburg, Tennessee, whom, as that indictment revealed, appeared as a witness before the Marion County, Tennessee Grand Jury. Mr. J. A. (Jeff) Payne, owner of the burglarized business house herein involved, was the named prosecutor in the third degree burglary indictment and said indictment also showed that he appeared as a witness before the aforesaid Grand Jury. The record shows that Officer Beene had personally observed the Petitioner, Mr. Cross and another man breaking into the said Mr. Payne's business house, and had personally assisted in the arrest of the Petitioner and Mr. Cross. The record showed that Mr. William S. Bynum was a regular police officer for the City of South Pittsburg, Tennessee; that he apprehended and arrested Mr. Cross at the scene of these crimes and that he appeared as a witness before the Marion County, Tennessee Grand Jury in these matters.

After the jury was selected, the witnesses were sworn and placed under the rule of exclusion or sequestration of witnesses. Mr. J. A. (Jeff) Payne, the prosecutor in the third degree burglary charge, completed his testimony. Officer Beene on direct examination testified about the Petitioner's breaking into and entering Mr. Payne's business house and about the arrest of the Petitioner. After the foregoing had occurred, one of the State's Attorneys in the case advised the court that Officer Beene had just entered the courtroom and asked the court whether he was subject to the rule of exclusion or sequestration of witnesses. The trial court held, over objection, that since Officer Beene was a prosecutor in one (1) of the two (2) cases tried together he could remain in the courtroom. The record showed that both these cases arose out of the same incident.

In the case of **Smartt v. State**, 112 Tenn. 539, 80 S. W. 586 (1903), relied upon by the Petitioner herein, the Tennessee Supreme Court held, *inter alia,* that it was not error for a trial judge to allow a prosecutor, though a witness, to remain in the courtroom and give testimony after hearing other witnesses testify, even though the rule of sequestration of witnesses had been called for and invoked, but that the trial court should require the prosecutor to testify first. The court also held that even if it was error for the trial court to refuse to require the prosecutor to be examined first after the rule was invoked, the court could not see that any substantial injury was done to the Defendant upon reviewing the entire record.

The settled rule in the State of Tennessee and elsewhere is that the matter of placing witnesses under the rule or exempting them is one which rests in the discretion of the trial judge and his action thereon will not be reversed unless it is made to appear that he abused his discretion

to the prejudice of the Defendant. **Nance v. State**, 210 Tenn. 328, 358 S. W. (2d) 327 (1962); **Bostwick v. U. S.**, 218 F. 2d 790 (1955); **Charles v. U. S.**, 215 F. 2d 825 (1954); **Johnston v. U. S.**, 260 F. 2d 345, **cert. denied** 360 U. S. 935, 79 S. Ct. 1454, 3 L. Ed. 2d 1547 (1959), and **U. S. v. Brooks**, 303 F. 2d 851, **cert. denied** 371 U. S. 889, 83 S. Ct. 184, 9 L. Ed. 2d 122 (1962), and **Taylor v. U. S.**, 388 F. 2d 786 (1967).

In **Wharton's, Criminal Evidence**, 12th Ed., Anderson, Vol. 3, sec. 840 (1955), cited by the Tennessee Supreme Court in the **Nance** case, *supra*, the author, with supporting authority from several state and federal courts, states:

> "The violation of the order of sequestration does not in itself make the witness incompetent or compel his exclusion" (Vol. 3 at page 209).

In **Wharton's, Criminal Evidence**, 12th Ed., Anderson, Vol. 3, sec. 840 (Supp. 1969), the author further stated, with various state and federal supporting authorities, that:

> "And the court has the discretion to permit the witness to testify although present in the courtroom in violation of the rule."

The Respondent submits that in the instant case the Petitioner has failed to show that the trial court abused its discretion herein and that the question herein involved is not substantial or one of broad national concern. Any possible conflicts in these wtinesses' testimony were immaterial and in view of the fact that the evidence showed that the Petitioner was observed committing these crimes and arrested at the time thereof, there can be no question of any possible error affecting the trial.

CONCLUSION.

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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C. HAYES COONEY,
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